The EU as the Appropriate Locus of Power for Tackling Crises: Interpretation of Article 78(3) TFEU in the case Slovakia and Hungary v Council

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Undoubtedly the CJEU's judgment in *Slovakia and Hungary v Council* of 6 September 2017 is going to illuminate for some time many a discussion not only on asylum but also on institutional matters in the EU. I will not attempt a comprehensive analysis of the judgment here. My attention was captured by one particular aspect of the CJEU's reasoning, namely the implicit recognition of the EU as the appropriate forum for taking *effective* action to address the emergency situation in Italy and Greece created by a sudden inflow of third country nationals.

The Court's Interpretation of Article 78(3) TFEU

The relocation mechanism disputed by Slovakia and Hungary was enshrined in a Council Decision (EU/2015/1601) which was adopted following a non-legislative procedure, relying on Article 78(3) TFEU for legal basis. The provision states:

'3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.'

Slovakia and Hungary challenged the Decision, among others, on the basis that the effects of the act were in fact legislative. As a result, the two Member States alleged, the Decision should have been adopted following a special legislative procedure.

The Court replied in two steps. First, it established through a contrario reading of Article 289(3) TFEU that 'non-legislative acts are those that are adopted by a procedure other than a legislative procedure' [58]. Only where the Treaty provisions explicitly mention either the ordinary or the special legislative procedure can the act adopted on the basis thereof be classified as 'legislative'. This is not the case with Article 78(3) TFEU. We can call this the procedural aspect of classification of legal acts in the EU which is, in and of itself, fairly uncontroversial. However, in order to prevent circumvention of safeguards present in the legislative procedure, the judicial examination of a disputed legal act must also contain a material component. This was carried out in the second step.

The material component of Article 78(3) TFEU is represented by the term 'provisional measures' to which there is no further specification or strings attached other than the act having to be adopted in response to 'an emergency situation characterised by a sudden inflow of nationals of third countries'. In view of the situation in Italy and Greece in 2015, it can be safely said that a reasonable person would consider the latter condition to be clearly satisfied.

Slovakia and Hungary argued for a contextual reading of paragraph 3 in light of the entire Article 78 TFEU and in particular paragraph 2 which lists the various legislative measures which can be taken by the EU institutions for the purposes of developing a common asylum policy. The two Member States alleged that 'provisional measures' adopted on the basis of paragraph 3 should not, in essence, substantially deviate from the legislative measures provided for under paragraph 2 of Article 78 TFEU which do not envisage the physical redistribution of refugees among the Member States (the closest would come point (e) in the list which concerns the mechanism for allocation of responsibility for asylum applications, i.e. the Dublin system).

The argument was rejected by the CJEU in strong terms. The Court stated that the two paragraphs of Article 78

TFEU are ‘distinct provisions of primary EU law pursuing different objectives’ and each with its own conditions for application including the types of acts to be adopted (legislative v non-legislative). ‘Those provisions are complementary’, the Court said, which permits the EU:

‘to adopt, in the context of the common policy on asylum, a wide range of measures in order to ensure that it has the necessary tools to respond effectively, both in the short term and in the long term, to migration crises.’ [74]

A contrary interpretation which would restrict the range of possible ‘provisional measures’ under Article 78(3) TFEU would ‘significantly reduce its effectiveness’. It is therefore clear to the Court that:

‘the concept of ‘provisional measures’ within the meaning of Article 78(3) TFEU must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries.’ [77]

The circumstances of the case affirm that the scope of provisional measures is at least broad enough to allow the non-legislative act to provide for temporary derogations from legislative acts. These must be materially and temporally circumscribed which in the CJEU’s view was fulfilled in the case at hand.

Taking up the Reins of Crisis Response

The refutation of Slovakia’s and Hungary’s arguments relating to the (non-)legislative nature of the contested Council Decision appears highly sensible. The Court’s distinction between the objectives and measures provided for on the one hand by paragraph 2 (the long-term policy), and paragraph 3 of Article 78 TFEU (the emergency response), which made way for a broad interpretation of the term ‘provisional measures’, is persuasive. It is of course particularly persuasive if one buys into the Court’s tendency towards purposive and effectiveness-oriented jurisprudence traditionally known from the integration of the internal market which might now be spreading to asylum law (symbolically nearly 20 years after the signing of the Amsterdam Treaty).

It should be remembered, however, that the consequences of pronouncing legal a non-legislative act which creates binding obligations on Member States to relocate asylum seekers regardless of their consent in derogation from applicable legislation are not trifling. Moreover, although the relocation mechanism was (is) temporary, the effects of relocating Syrian and Eritrean refugees with no immediate perspective of return will linger far beyond the two year duration of the mechanism and this is the case for both the refugees and the receiving Member States. For all this to happen on the basis of an inclusive and purposive interpretation of the term ‘provisional measures’ rather than an explicit constitutional agreement only adds gravity to the occasion. The seriousness of derogations from standard law-making practices which also go beyond the usual in terms of impact on Member State sovereignty, even when the situation as in this case deserves such exceptions, should not be overshadowed either by the questionable behaviour of the two Member States throughout the affair.

Being aware of the gravity of the case adds to the importance of a broader point which can be made about the CJEU’s reasoning: the Court takes seriously and adds emphasis to the EU’s collective responsibility to address, *effectively*, refugee crises. For that, the EU needs to have the necessary capacities, in this case a sufficiently broad interpretation of what provisional measures can entail. The Court, however, expressed the same sentiment with respect to the long term articulation of rules on the various aspects of the common asylum policy listed in Article 78(2) TFEU. Since the asylum competences are there in the Treaties to be exercised, the EU as a whole, and not the Member States individually or any other international body, should be doing what it takes to tackle the emergency situations faced by some of the EU’s Member States. In the argumentation of the Court, the EU and its capacities under the Treaties are implicitly positioned as the appropriate locus of power for addressing difficult internal crises.

One question begged by this ‘must-do’ philosophy of a common EU crisis response is whether it is a manifestation of an underlying integrationist flame burning in the heart of the CJEU, a pragmatic but necessary response, or a convenient marriage of both? Difficult to say. For a variety of also objective reasons, the (CJ)EU’s responses to other crises *de nos jours* have not been arguably imbued by a similar insistence on the EU’s collective responsibility and capacity following from the framework of the EU Treaties.

In *Pringle*, the CJEU pragmatically relaxed the requirements of the Treaties to accommodate an intergovernmental arrangement outside the EU framework to save the euro. There too democratic praxis was unfortunately set aside to make room for an emergency fix. In the crises in Poland and Hungary, the EU is struggling to form a unified front and muster an effective response to save not only its common identity but also the mutual trust principle. How and whether at all the Court will react to the latter is as yet unclear. But it could do worse than reminding everyone concerned of the common commitments resulting from the Treaties and point to the internal capacity of the EU to address the crises.

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